APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED MARCH 20, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-6482

D.C. Docket No. CV-95-AR-2212-M

KATHLEEN KAZANJIAN,

Plaintiff-Appellant,

versus

ANNISTON CITY BOARD OF EDUCATION, PAUL GOODWIN, Dr., et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(March 20, 1998)

Before BARKETT, Circuit Judge, GODBOLD and GOODWIN*, Senior Circuit Judges.

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* Honorable Alfred T. Goodwin, Senior U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

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PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1.[1]

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1. 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleading is supported by the record;

(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION DATED AUGUST 12, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

CIVIL ACTION NO.

CV 95-AR-2212-M

KATHLEEN KAZANJIAN,

Plaintiff,

v.

ANNISTON CITY BOARD OF EDUCATION, et al.,

Defendants.

MEMORANDUM OPINION

The court has before it cross motions for summary judgment, the first filed by plaintiff, Kathleen Kazanjian ("Kazanjian"), and the second filed by defendants Anniston City Board of Education ("the Board"), Dr. Paul Goodwin ("Goodwin") and Cornell Howard ("Howard"). Kazanjian alleges that she was terminated from her employment with the Board and that said termination was a breach of her employment contract with the Board, was in violation of 42 U.S.C. § 1981 and § 1988, was in violation of her constitutional right to due process protected by the Fourteenth Amendment, was in

violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* ("Title VII"), was in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("the ADEA" and was an act constituting suppression of a material fact. Because genuine issues of material fact exist with regard to some of Kazanjian's claims, defendant's motion shall be granted in part and denied in part, and Kazanjian's motion will be denied.

I. Undisputed Facts

Kazanjian, a state certified teacher with twenty years of teaching experience, was hired by the Board on August 28, 1992, as a fifth grade teacher at Norwood Elementary School. Kazanjian is white. On May 26, 1993, Kazanjian and all other non-tenured teachers in the Anniston system were terminated by the Board. Kazanjian was then re-hired by the Board on July 30, 1993, as a fourth grade teacher at Randolph Park Elementary School.

Fourteen teachers, including Kazanjian, were teaching at Randolph Park during Kazanjian's one year of service at that school. Of these 14 teachers, eight were black and six were white. Kazanjian was the only Randolph Park teacher without tenure in the Anniston City system.

At the end of the 1993-94 school year, Howard, principal at Randolph Park, recommended that Kazanjian and Annye R. Donald, a black female with tenure, not be rehired for the upcoming school year. In a form marked "Confidential" sent to Superintendent Goodwin, Howard stated as his reasons for recommending non-renewal Kazanjian's inability to preserve classroom discipline and her failure to encourage student

participation in school events. Goodwin closed by adding: "Students respond negatively to the teacher." Kazanjian was never shown a copy of this form.

On May 3, 1994, Goodwin recommended to the Board that Kazanjian, along with 13 other non-tenured teachers, not be re-hired for the following year. On May 6, 1994, the Board notified Kazanjian that her contract would not be renewed for the 1994-95 school year. Kazanjian, then age 52, was replaced at Randolph Park by a white female, Sara Erlene Lee ("Lee"), age 31.

At the time Kazanjian's contract was not renewed, the Board had in place a policy regarding the evaluation of non-tenured teachers. Pursuant to this policy, Kazanjian had been observed and evaluated by supervisory personnel several times while at Randolph Park. For every evaluation that was prepared before she was terminated, Kazanjian was given the opportunity to review and object to her evaluations. Kazanjian signed all of these evaluations without objection. At Goodwin's request, Howard prepared during the summer of 1994 and post-dated to April 29, 1994, one final evaluation of Kazanjian that reflected Howard's recommendation to Goodwin that Kazanjian not be rehired. Kazanjian was no longer employed by the Board when this evaluation was prepared and was not given the opportunity to review or sign this last evaluation.

Kazanjian filed a charge of employment discrimination with the Equal Employment Opportunity Commission ("the EEOC") on October 24, 1994. In this EEOC charge, Kazanjian claimed that she had been discriminated against because of her age. The EEOC notified the Board of Kazanjian's age discrimination claim on October 24, 1994. On June 28, 1995,

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Kazanjian filed an amended charge with the EEOC adding a claim of race discrimination to her claim of age discrimination. The EEOC notified defendants of Kazanjian's amended charge on July 20, 1995. The EEOC mailed Kazanjian her "right-to-sue" letter on August 25, 1995. Kazanjian filed this action on August 29, 1995.

II. Analysis

Summary Judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." F.R.Civ.P. 56(c). The inquiry when ruling on a Rule 56 motion is "'whether the evidence presents a sufficient disagreement to require submission to [the trier of fact] or whether it is so one-sided that one party must prevail as a matter of law.' " *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 594 (11th Cir. 1995) (*per curiam*) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248

a. Plaintiff's Rule 56 Motion

Kazanjian's motion for summary judgment and accompanying brief are devoted almost exclusively to her argument that she has sufficient evidence to establish a *prima facie* case on all of the claims found in her complaint. What Kazanjian fails to provide, however, is even a smattering of evidence upon which this court could consider granting summary judgment in her favor. Accordingly, Kazanjian's motion for summary judgment will be denied, and her evidentiary submissions and arguments in support of that motion, as redundant as they may be, will only be considered as opposition to defendants' Rule 36 motion.

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b. Count I

Count I of Kazanjian's complaint consists entirely of claims against the Board under §§ 1981 and 1988. In addition to her § 1981 claim, Kazanjian has also chosen in Count IV to seek redress from the Board, a representative arm of the State of Alabama, for her alleged injuries under 42 U.S.C. § 1983. In cases where state actors are sued under both of these statutes, any cause of action under § 1981 is *merged* into the potential § 1983 recovery *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 731 (1989). Because § 1983 works to the exclusion of any recovery under § 1981 in this case, defendants' motion will be granted as to Kazanjian's claim brought pursuant to § 1981.

Kazanjian also invokes § 1988 in Count I, but "[s]ection 1988 authorizes attorney's fees as part of a remedy for violations of civil rights statutes; it does not create an independent right of action." *Estes v. Tuscaloosa County*, 696 F.2d 898, 901 (11th Cir. 1983). Thus, Kazanjian's purported claim against the Board under § 1988 states no independent claim for which relief can be granted. Accordingly, defendants' motion for summary judgment will be granted on this claim without prejudice to a claim for attorney's fees in the event Kazanjian prevails.

c. Reverse Race Discrimination

In Count II of her amended complaint Kazanjian alleges :hat the Board, through Howard, engaged in reverse race discrimination by not renewing her contract and thus is liable to her under Title VII. Kazanjian may establish *prima facie* case of Title VII discrimination under the well-established methodology from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). Under the *McDonnell Douglas* test, a

prima facie case of race discrimination is established with circumstantial evidence where a plaintiff: (1) belongs to a protected racial group; (2) was subjected to an adverse job action; (3) was either replaced by someone outside the protected group or a similarly situated person outside of the protected group did not receive the adverse employment action at issue; and (4) was qualified to do the job. *Id.* at 802. As a prerequisite to filing her Title VII claim of discrimination, Kazanjian must also have exhausted the administrative procedures called for in Title VII. *Griffin v. Carlin,* 755 F.2d 1516, 1529-30 (11th Cir. 1985). Because Kazanjian has not made out a *prima facie* case under Title VII and also because she failed to exhaust her administrative remedies with regards to her claim of race discrimination, defendants' motion will be granted as to this claim.

i. Administrative Prerequisites

Kazanjian received notice on May 6, 1994, that her contract of employment with the Board would not be renewed. Kazanjian filed her charge of *age* discrimination with the EEOC on October 24, 1994. The Board received notice from the EEOC on November 16, 1994, that Kazanjian had filed her charge of age discrimination and that the EEOC would be investigating a claim of age discrimination. Kazanjian amended her EEOC charge on June 28, 1995, to include a charge of race discrimination. The EEOC notified the Board on July 25, 1995, that Kazanjian's discrimination charge had been expanded to include a claim of race discrimination.

It is well established that before initiation of a Title VII lawsuit, a plaintiff must first file a charge alleging discrimination with the EEOC within 180 days after the alleged

discrimination occurred. 42 U.S.C. § 2000e-5(e) (1). This administrative remedy prerequisite is mandatory and may not be side-stepped by a plaintiff. *Thomas v. Kroger Co.*, 24 F.3d 147, 150 (11th Cir. 1994). The Board does not dispute that Kazanjian met her filing deadline with regards to her age discrimination claim. The Board, however, argues that Kazanjian's race claim amendment was untimely and is thus inappropriate for consideration by this court.

This defense raised by the Board challenges whether Kazanjian's amended race charge relates back to her age charge and thus falls within the 180 day period for charges with the EEOC. Kazanjian is correct in pointing out there should be some liberality in the interpretation of administrative prerequisites since EEOC charges are usually filed by lay persons. *Turner v. Orr*, 804 F.2d 1223, 1226 (11th Cir. 1986). However, [t]he starting point for determining the permissible scope of the judicial complaint is the EEOC charge and investigation." *Evans v. U.S. Pipe & Foundry Co.*, 696 F.2d 925, 929 (11th Cir. 1983). From the evidence of record, it is undisputed not only that Kazanjian marked *only* the box for age discrimination in her original charge, but also that the EEOC limited its investigation to a charge of age discrimination up to and until July 25, 1995.

Kazanjian has offered no plausible authority as to how an investigation into her race claim could have arisen out of her age discrimination charge. Not only do race discrimination and age discrimination charges not ordinarily go hand-in-hand, but, based on its correspondence with the Board, the EEOC obviously did not consider Kazanjian's original discrimination claim to include a charge of race discrimination. Because there is no evidence to suggest that a genuine issue of fact exists on

whether Kazanjian's amended charge of race discrimination was within the scope of the investigation into her charge of age discrimination, that aspect of the amended charge does not relate back to the time of filing of her original charge. Accordingly, the charge of racial discrimination is time barred unless could have been timely filed on June 28, 1995, the date of the amendment. *Equal Employment Opportunity Comm'n v. Mississippi College*, 626 F.2d 477, 483-84 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981).[1] *See also Dennis v. Pan American World Airways, Inc.*, 746 F. Supp. 288, 291 (E.D.N.Y. 1990) (relation back of amendment not allowed because race discrimination and age discrimination are not likely to go hand-in-hand).

As set out above, Kazanjian knew no later than May 1994 that her employment with the Board was being terminated. Her charge of race discrimination was not filed with the EEOC until June 1995, some 390 days after the alleged discriminatory act took place. Because this filing was clearly outside of the 180 days allowed for filing a charge of discrimination under Title VII, Kazanjian has failed to exhaust her administrative remedies with regards to her Title VII claim of reverse race discrimination. Defendants' motion for summary judgment will therefore be granted as to that portion of Kazanjian's action.

ii. Intentional Race Discrimination

Assuming, *arguendo*, that Kazanjian was timely with her EEO charge of race discrimination, she has otherwise failed to

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1. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all the decisions of the former Fifth Circuit rendered prior to October 1, 1981.

meet her *prima facie* case of Title VII discrimination of the four elements from *McDonnell Douglas* set out above, the Board correctly argues that Kazanjian has failed to submit evidence either that she was replaced with someone outside of her protected class or that a black teacher in the Board system under similar circumstances did not receive the same adverse employment action.

The evidence submitted by the parties clearly shows that Kazanjian was replaced by Lee, a white female. Although not precisely similarly situated, Annye R. Donald, a black tenured teacher, was also recommended for non-renewal by Howard in the same form recommendation with Kazanjian. Also, twelve non-tenured teachers in addition to Kazanjian were recommended to the Board for non-renewal by Goodwin at the end of the 1993-94 school year. Of those twelve, Barbara Baker and William Kennedy are black. Baker was among the six of these twelve who, including Kazanjian, were ultimately not renewed by the Board.

Being unable to show that she received disparate treatment on account of her race, Kazanjian has failed to make out a *prima facie* case of race discrimination under Title VII. Thus, even if Kazanjian did timely file an EEO charge of race discrimination, there is no genuine issue of fact on whether she actually suffered discrimination on account of her race. As a result, defendants' motion for summary judgment must be granted as to the Title VII portion of Kazanjian's action.[2]

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2. In their brief, defendants also object to any Title VII claim Kazanjian has against Howard or Goodwin. Kazanjian makes clear in Count II that her Title VII claim are brought against Howard or Goodwin solely in their official capacity. Because Kazanjian has made a Title VII claim against the Board, her true employer, and because Title VII

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d. The ADEA

Kazanjian has also alleged that the circumstances surrounding her non-renewal constituted age discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA"). Kazanjian, 52 years old at the time her contract was not renewed, complains that she was terminated because of her age in order to be replaced by a younger teacher.

The relevant section of the ADEA makes it illegal "for an employer to . . . discharge any individual . . . because of such individual's age." 29 U.S.C. § 623(a) (1).[3] "In an unlawful discharge case the plaintiff must ultimately prove by the preponderance of the evidence that age was a determining factor in the employer's decision to fire h[er]." *Clark, v. Coats & Clark, Inc.*, 990 F.2d 1217, 1226 (11th Cir. 1993). Because she bears the ultimate burden, Kazanjian must initially establish a *prima facie* case for age discrimination. *Walker v. Nationsbank*, 53 F.3d 1548, 1555 (11th Cir. 1995).

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employment discrimination claims may only be brought against an employer, Kazanian's Title VII claims against Howard and Goodwin are an unnecessary redundancy. *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991). Accordingly, Goodwin and Howard to the extent Kazanjian makes a Title VII claim against the Board, her true employer, and because Title VII employment discrimination claims may only be brought against an employer, Kazanjian's Title VII claims against Howard and Goodwin are an unnecessary redundancy. Busby v. City of Orlando, 931 F.2d 764, 772 (11th Cir. 1991). Accordingly, Goodwin and Howard, to the extent Kazanjian makes a Title VII claim against them in *any* capacity, are also entitled to summary judgment.

3. In ADEA-speak, the term "employer" includes "a State . . . or any agency or instrumentality of a State . . . ." 29 U.S.C. § 630(b) (2).

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Kazanjian may establish her *prima facie* case by one of three ways: (1) direct evidence of discriminatory intent, (2) statistical evidence of discriminatory impact, or (3) the four-pronged scheme derived from *McDonnell Douglas. Clark,* 990 F.2d at 1226. Kazanjian has neither alleged nor proven that she has statistical evidence that older employees are being discriminated against by the Board. Likewise, Kazanjian does not attempt to argue that she has direct proof that she was dismissed on account of her age.

Given the elimination of direct or statistical evidence of discrimination, the court is forced to consider the question of a *prima facie* case under the paradigm derived from *McDonnell Douglas.* Under this scheme, Kazanjian is initially required to show that she "was a member of the protected group of persons [under the ADEA} between the ages of 40 and 70, was subject to adverse employment action . . . and was qualified to do the job."[4] Clark 990 F.2d at 1226 (quoting *Mitchell v. Worldwide Underwriters Ins. Co.*, 967 F.2d 565, 566 (11th Cir. 1992)). Kazanjian, over age 40, fell within that group of persons protected by the ADEA. See 29 U.S.C. § 631(a). Because her contract of employment was not renewed, Kazanjian was also subjected to an adverse employment action. The only remaining ADEA issue is whether Kazanjian was qualified for her job as a teacher.

The Board argues that Kazanjian was dismissed for the reasons stated in Howard's recommendation form. While this is some evidence of job qualification, the proper inference to

4. A fourth prong, proof that Kazanjian was replaced with a person outside the protected age group, is not longer a part of the ADEA *prima facie* case of discrimination. *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307, 1310 (1996).

be derived from these facts is that because Kazanjian had over 20 years of teaching experience, two of them in the Anniston City system, she was qualified to fill the position she held at Randolph Park. The court therefore concludes that Kazanjian has established a *prima facie* case of discrimination under the ADEA and has thereby created "a rebuttable presumption of unlawful discrimination." *United States v. Crosby,* 59 F.3d 1133, 1135 (11th Cir. 1995).

The Board may now rebut this presumption by offering proof of a legitimate, non-discriminatory reason for not renewing Kazanjian's teaching contract. *Id.* The court will now consider the Board's argument that Kazanjian's performance as an educator was substandard to be this stated reason. Because the Board's burden at this stage is one of *production* rather than *persuasion,* the Court finds that the Board has met its burden. The burden now returns to Kazanjian to show that the stated reason was a mere pretext for the Board's true motive for not retaining age discrimination.

Kazanjian interposes as her argument of pretext evidence that 1) she was replaced by someone outside of the ADEA projected age group and 2) the fact that Howard and Goodwin felt compelled to create then back-date an evaluation that supported Howard's recommendation that Kazanjian not be renewed. A trier of fact could certainly infer that this swap which occurred in the summer of 1994 was done in response to the EEO charge filed by Kazanjian.

At first glance, these pieces of evidence would seem to run afoul of *St. Mary's Honor Ctr. v. Hicks,* 113 S. Ct. 2742, 2749 (1993). As the Supreme Court explained in St. Mary's, mere evidence that the employer's legitimate non-

discriminatory reasons are pretextual does not compel a finding for the plaintiff. Instead, the plaintiff must show by a preponderence of the evidence that the articulated reason is a pretext *for discrimination. Id.* However, *St. Mary's* holding was limited to the examining the burden of proof required to prevail *at trial*, leaving open the question of what is necessary to overcome summary judgment. Several lower federal courts have held that at summary judgment, the plaintiff must present evidence that raises a genuine issue of material fact that the true reason for the employers action was discrimination; pretext alone is not sufficient. *See, e.g., Theard v. Glaxo, Inc.*, 47 F.3d 676, 680 (4th Cir. 1995); *Woods v. Friction Materials, Inc.*, 30 F.3d 255, 260 n.3 (1st Cir. 1994); *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955, 958 (5th Cir. 1993) *See also Lamb v. Runyon,* 915 F Supp. 300, 306 (M.D. Ala. 1995).

The Eleventh Circuit, which provides this court with its marching orders, has spoken differently on the issue stating:

> *St. Mary's* holds that *proof* that a defendant's articulated reasons are false is not *proof* of intentional discrimination; it is merely *evidence* of intentional discrimination. However, *evidence* of intentional discrimination is all a plaintiff needs to defeat a motion for summary judgment. That evidence must be sufficient to create a genuine factual issue with respect to the truthfulness of the defendant's proffered explanation.
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> Under *St. Mary's,* a plaintiff withstands summary adjudication by producing sufficient evidence to

> allow a reasonable finder of fact to conclude that the defendant's articulated reasons for its decision are not believable.

Howard v. BP Oil Co., Inc., 32 F.3d 520, 525-26 (11th Cir. 1994) (emphasis in original). Following this guidance from *Howard*, Kazanjian's evidence that the Board's articulated reason for dismissing her is pretextual provides sufficient evidence for her action to survive summary judgment. Kazanjian has thus raised a genuine issue of material fact as to pretext, so defendant's motion for summary judgment as to Kazanjian's ADEA age discrimination claim will be denied.

e. Breach of Contract

Kazanjian claims in Count VI that Howard, Goodwin and the Board breached her contract of employment by failing to follow the Board's teacher evaluation policy. This claim seems to center around Kazanjian's allegation that she was denied the opportunity to review and/or appeal a negative evaluation completed by Howard as well as Howard's recommendation and reasons stated therefore that Kazanjian not be rehired for the 1994-95 school year. *Fourth Amended Complaint* at ¶ IV.12. Kazanjian alleges that the Board, Howard and Goodwin were bound to follow this evaluation and appeal policy and thus breached her contract of employment with the Board when it failed to rehire her after not following said policy. *Fourth Amended Complaint* at ¶ VI.2-.3.

The teacher evaluation policy enacted by the Board provides the following:

> The evaluation of professional personnel shall be the responsibility of said employee's immediate

supervisor and appropriate supportive personnel. . . . In order to ensure and promote the welfare of professional personnel, the evaluation of said personnel shall always encompass the provisions that follow.

1. Evaluation for re-employment purposes shall be completed after not less than three classroom or work area visitation and conference by the evaluator.

2. The evaluator *shall reduce* the findings of each visitation to writing *and submit* the employee at a conference scheduled not less than five (5) days following each visitation. Said personnel *shall always* retain the right to disagree with the evaluation. In such cases, said personnel shall request, the Superintendent of Schools to appoint an evaluator in addition to said employee's immediate supervisor.

Defendant's exh. C (emphasis added).

On March 24, 1994, Howard transmitted to Goodwin the personnel employment recommendation form in which he advised Goodwin that Kazanjian should not be retained for the 1994-95 school year. In that form, Howard stated as the reasons for his recommendation that Kazanjian "Initiates but does not preserve classroom management and discipline. Does not encourage student participation in school sponsored activities and/or events. Students respond negatively to the teacher."

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Because this was not a teacher evaluation, nothing in the Board's policies required that it be disclosed to Kazanjian. However, during the summer of 1994, Goodwin requested that Howard create an evaluation of Kazanjian that supported his recommendation. *Howard depo.* at 125. Howard did so and included in the "Additional Comments" section language almost identical to that quoted above. *Plaintiff's exh.* H.12 at 2. Howard backdated this evaluation form to April 29, 1994, the same date that Howard had prepared a favorable evaluation of Kazanjian that did not include these disparaging remarks. *Howard depo.* at 125-26. Although Kazanjian had signed off on the original evaluation of April 29, she was neither given the opportunity nor did she sign off on Howard's supplemental evaluation.

Although the Board was not obligated by state law to adopt any type of evaluation and assessment procedure, having done so it is obliged to follow its policy. *Belcher v. Jefferson County Bd. of Educ.*, 474 So. 2d 1063, 1068 (Ala. 1985). Even with regards to non-tenured teachers, who otherwise would have no due process right, the Board's failure to follow a policy so enacted creates an *ex-contrtactu* cause of action in favor of teachers affected by that policy. *Id.*

Although the court easily finds that the Board failed to follow its evaluation policy with regards to the substituted evaluation, the dilemma this court reaches is that *Belcher* does nothing to limit the discretionary power of the Board to discharge a non-tenured teacher. In *Belcher* the court specifically held that a non-tenured teacher may be *summarily* terminated without cause shown and went on to state that even a good performance evaluation does not create an actionable expectation of continued employment. *Id.* at 1066-67. This ruling conforms to the statutory scheme concerning the authority of superintendents and boards of education to appoint

and dismiss all teachers, authority found in Ala. code §§ 16-8-23, 16-9-23 and 16-24-12. *See King v. Jefferson County Bd. of Educ.*, 659 So. 2d 686, 687 (Ala. Civ. App. 1995).

What this leaves Kazanjian with is a claim for breach of contract arising out of the Board's failure to disclose to her a negative evaluation, but not a claim for damages for not being rehired by the Board. Because nominal damages are always a possibility in breach of contract disputes and because the issue of damages is one for the jury in an action *ex* contractu, *Akzo Chemicals, Inc. v. Lining Technologies, Inc.*, 611 So. 2d 288, 289 (Ala. 1992), defendants are denied summary judgment on Kazanjian's breach of contract claim. However, should this matter actually go to trial, the parties should be prepared to enlighten the court with regards to jury instructions on just what damages, if any, may be recoverable on account of the breach.

f. Procedural Due Process

In Count IV of her Fourth Amended Complaint, Kazanjian alleges that she "was not afforded any procedural due process" regarding her dismissal/non-renewal by the Board. While not specifically invoked in the complaint, this claim against the Board, a state actor, can only be a claim that the board has somehow violated Kazanjian's due process rights established by the Fourteenth Amendment.[5] Because the Fourteenth Amendment does not provide a cause of action for the enforcement of its provisions and because there is no common law cause of action for violations of procedural due process, the court also deems this rather amorphous claim against the

5. The Fourteenth Amendment provides that "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. § 1.

Board to be one brought pursuant to 42 U.S.C. § 1983. In Count V Kazanjian brings similar claims under § 1983 against Howard and Goodwin in their individual capacities.

Kazanjian was given no reason for her non-renewal at the time of her termination. It was not until later that she discovered the existence of Howard's suggested or "articulated" reasons for the non-renewal. Under Alabama law, a tenured teacher has a property interest in continued employment that entitles that teacher to invoke the procedural safeguards of due process in instances of non-renewal. Ala. code § 16-24-2 (a), (c). *See also Bell v. Board of School Comm'rs of Mobile County,* 450 F. Supp. 162 166 (S.D.. Ala. 1978). However, Alabama law does not require that a non-tenured teacher, such as Kazanjian, be given an explanation or hearing in conjunction with notice of non-renewal. *Foster v. Blount County Bd. of Educ.,* 340 So. 2d 751 Ala. 1976). However, the due process rights accorded to tenured teachers will accrue to a non-tenured teacher when the circumstances of non-renewal either sully "a person's good name, reputation, honesty or integrity" or impose "a stigma or other disability that [forecloses the teacher's] freedom to take advantage of other employment opportunities." *Board of Regents of State Colleges v. Roth,* 405 U.S. 564, 573 (1972).

Thus, Kazanjian had the right to expect an opportunity to refute those charges made by Howard, repeated by Goodwin and used by the Board if Howard's comments either impugned her reputation or stigmatized her opportunities to seek other teaching employment. Undoubtedly, these comments became a part Kazanjian's file on record with the Board. This court can assume, as could the trier of fact, that any school system Kazanjian might approach for future employment could gain access to those records. This evidence demonstrates that a

genuine issue of fact exists on whether defendants owed Kazanjian some type of opportunity to refute and appeal Howard's replacement evaluation.

Defendants argue that the existence of the damaging evaluation is irrelevant because they were under no obligation to offer Kazanjian an explanation of why she was not being renewed. This argument does possess some logic, because had Howard not attempted to swap evaluations or include the damaging language in his recommendation to Goodwin, Kazanjian could have been non-renewed for no reason at all, and no explanation would have been required. As stated before, even the most glowing of performance evaluations does not give rise to a property interest in continued employment for a non-tenured Alabama teacher. *Belcher,* 474 So. 2d at 1066-67. However ironic it might be, the possible inference that Howard manufactured a negative evaluation of Kazanjian out of whole cloth pulls this action within the purview of *Roth.*

Having found that a due process right might exist, Howard and Goodwin also attempt to hide behind the shield of qualified immunity. In their supporting brief, defendant's state "there is no clearly established law requiring that a non-tenured teacher be given an explanation of her non-renewal, nor is there clearly established law requiring that a non-tenured teacher receive a year-end evaluation prior to her renewal." *Defendants' brief* at 25. By making such an argument defendants confess that they are aware that the doctrine of qualified immunity will only shield Howard and Goodwin if no reasonable person could have known that the acts as alleged by Kazanjian represented a constitutional violation. *Mason v. Stallings,* 82 F.3d 1007, 1010 (11th Cir. 1996). In light of *Roth,* the law of this land since 1972, defendant's qualified immunity argument fails.

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Having found that a genuine issue of material fact exists regarding whether defendants denied Kazanjian her due process rights with regards to the circumstances surrounding her non-renewal, and also having found that the defense of qualified immunity is unavailable to Howard and Goodwin, defendants' motion for summary judgment must fail with regards to Counts V and VI.

g. Fraud

The remaining count in plaintiff's complaint is one for suppression of material facts leveled at Howard. Howard made his recommendation to Goodwin that Kazanjian not be renewed on March 24, 1994. On April 29, 1994, Howard disclosed to Kazanjian his evaluation which made no mention of the problems discussed in his recommendation. Under the state tort theory of fraudulent suppression, Kazanjian claims that Howard, and Howard alone, owed her a duty to inform her of the fragile nature of her employment, and that he purposefully suppressed the fact that she was to be terminated at the end of the 1993-94 school year.

In order to establish a claim for fraudulent suppression Kazanjian must offer "evidence 1) that the defendant had a duty to disclose material facts, 2) that the defendant concealed or failed to disclose those facts, 3) that the concealment induced the plaintiff to act; and 4) that the plaintiff's action resulted in harm to the plaintiff." *Mason v. Chrysler Corp.*, 653 So. 2d 951, 954 (Ala. 1995) Kazanjian argues that the existence of the Board's evaluation policy created an obligation on the part of Howard, her supervisor, to provide her with either a copy of his non-renewal recommendation or his reformed evaluation rather than his positive evaluation. Kazanjian further claims

that she relied on the positive evaluation actually disclosed to her by Howard because she would have appealed the negative evaluation had Howard produced it on April 29. She claims this reliance harmed her in that a successful appeal might have provided for the renewal of her contract for the 1994-95 school year.

Howard's primary defense to these allegations is that the decision not to renew Kazanjian would have been and was made irrespective of the evaluation swap and that any appeal would have been ineffectual. This conjecture about the subjective nature of the Board's personnel decision making process is interesting, but it does not refute the fact that the switch was on when it came to Kazanjian's evaluations. Howard does not attempt to offer an explanation as to why he would have recommended dismissal for Kazanjian, one month later give her a positive evaluation, and then even later back-date an evaluation that conformed to his recommendation of non-renewal. Because Kazanjian has produced colorable evidence to create a genuine issue of fact on her allegation of fraudulent misrepresentation by Howard, defendants' motion will be denied as to this portion of the action.

III. Conclusion

Kazanjian has failed to demonstrate with her evidence a genuine issue of material fact on her claims against the Board under § 1981, § 1988, and Title VII. As a result, defendants motion for summary judgment will be granted as to Counts I and II of Kazanjian's action. Kazanjian's evidence does, however, find its mark on her claims of breach of contract against the Board, under § 1983 against all defendants, of ADEA discrimination against the Board, and fraudulent

misrepresentation against Howard. Accordingly, defendants' motion will be denied as to those claims. A separate and appropriate order will be so entered.

DONE this day of August, 1996.

s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT COURT

APPENDIX C — ORDER FOR THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION DATED AUGUST 12, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

CIVIL ACTION NO.

CV 95-AR-2212-M

KATHLEEN KAZANJIAN,

Plaintiff,

v.

ANNISTON CITY BOARD OF EDUCATION, et al.,

Defendants.

ORDER

In conformity with the accompanying memorandum opinion, the court EXPRESSLY DETERMINES that there exist no genuine issues of material fact as to certain issues that defendants Anniston City Board of Education ("the Board"), Dr. Paul Goodwin ("Goodwin") and Cornell Howard ("Howard") are entitled to partial summary judgment as a matter of law as to said issues. Accordingly it is ORDERED, ADJUDGED and DECREED by the court that the motion for

summary judgment of defendants be and the same is hereby GRANTED to the following extent:

> (1) plaintiff's claims in Count I seeking recovery from the Board under 42 U.S.C. §§ 1981 and 1988; plaintiff's action, insofar as she makes a claim under § 1981 in Count I, is DISMISSED WITH PREJUDICE; plaintiff's action, insofar as she makes a claim under § 1988 in Count I, is DISMISSED WITHOUT PREJUDICE as to a claim for attorney's fees in the event plaintiff prevails on any claim or claims that would call for attorneys fees;
>
> (2) plaintiff's claim in Count II seeking recovery under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.;* plaintiff's action, insofar as she makes said claim, is DISMISSED WITH PREJUDICE.
>
> (3) Plaintiff's claim under the Age Discrimination Employment Act to the extent it may be directed at individuals not her employer; plaintiff's action, insofar as she may make said claim, is DISMISSED WITH PREJUDICE.

Defendants' motion for summary judgment, as addressed to all other aspects of the complaint, namely the claims found in Counts III, IV, VI and VII of plaintiff's Fourth Amended Complaint, is hereby DENIED. It is further ORDERED ADJUDGED and DECREED by the court that the motion for summary judgment of plaintiff be the same is hereby DENIED. This action shall proceed to trial on the claims not disposed of by defendants' motion for summary judgment.

Appendix C

Pursuant to Rule 54(b), F.R.Civ.P., the court DETERMINES that there is no just cause for delay of final judgment in favor of defendants to the extent above described and such judgment is DEEMED ENTERED.

DONE this 12th day of August, 1996.

s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT COURT

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED JULY 1, 1998

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 97-6482

KATHLEEN KAZANJIAN,

Plaintiff-Appellant,

versus

ANNISTON CITY BOARD OF EDUCATION, PAUL GOODWIN, Dr., et al,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19__, _____F.2d_____).

Before: BARKETT, circuit Judge, GODBOLD and GOODWIN*, Senior Circuit Judges.

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* Hon. Alfred T. Goodwin, Senior U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

Appendix D

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ illegible
UNITED STATES CIRCUIT JUDGE

APPENDIX E — PROBATION OF PROFESSIONAL PERSONNEL

PROBATION OF PROFESSIONAL PERSONNEL

In accordance with the Alabama School Code, all professional personnel eligible for tenure shall be considered as *on probationary status* until continuing service status (tenure) is attained. Continuing service status is attained when a person serves in the School District for three (3) consecutive school years and is re-employed for the succeeding school year.

During the probationary period, professional personnel may be dismissed by the Board at any time, upon written recommendation of the Superintendent of Schools *and a valid reason for dismissal.* If professional personnel are not notified, in writing, by the Board at the expiration of the probationary period that he has been discharged, said personnel shall automatically gain continuing service status.

APPENDIX F — EVALUATION OF PROFESSIONAL PERSONNEL

EVALUATION OF PROFESSIONAL PERSONNEL

The evaluation of professional personnel shall be the responsibility of said employee's immediate supervisor and appropriate supportive personnel. The evaluation of an employee's effectiveness, especially teaching personnel, is a difficult task and subjective in nature. However, the effectiveness of the total instructional program of the School District is dependent upon effective and competent professional personnel. Evaluation of professional personnel should be carried out by the School District in a systematic, *uniform and honest manner.* In order to insure and promote the welfare of professional personnel, the evaluation of said personnel shall always encompass the provisions that follow:

1. Evaluation for re-employment purposes shall be completed after not less than three classroom or work area visitations and conference by the evaluator.

2. The evaluator shall reduce the findings of each visitation to writing and submit to the employee at a conference scheduled not less than five (5) days following each visitation. Said personnel shall always retain the *right to disagree with the evaluation.* In such cases, said personnel shall *request the Superintendent of Schools to appoint an evaluator in addition to said employee's immediate supervisor.*

3. When, in the opinion of the evaluator the employee *needs to improve certain skills*

required in his work, the evaluator and employee should cooperatively develop a plan through which such skills might be acquired.

4. Every effort should be made by the School District to provide meaningful in-service opportunities for said personnel. Instructional specialists and consultants should be made available to work with employees needing and desiring their services. *Evaluators should make every effort to help professional personnel to grow professionally* and to become a competent and contributing member of the School District's professional staff.

5. However, *when all attempts to help* professional employees grow professionally *have failed* the best interest of the School District and the well-being of the students must be considered.